

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 13, 2009 Session

CHERIE LYNN DENNIS v. GEORGE EMMETT DENNIS, III

**Appeal from the Circuit Court for Hamilton County
No. 05 D 187 W. Neil Thomas, III, Judge**

No. E2008-01244-COA-R3-CV - FILED JUNE 17, 2009

Cherie Lynn Dennis (“Wife”) sued George Emmett Dennis, III (“Husband”) for divorce. After a trial, the Trial Court entered a Final Judgment that, *inter alia*, declared the parties divorced, distributed the marital property, named Wife the primary residential parent of the parties’ minor child with Husband to have visitation, and awarded Wife attorney’s fees. Husband appeals only the award to Wife of attorney’s fees. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed;
Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Phillip C. Lawrence, Chattanooga, Tennessee for the Appellant, George Emmett Dennis, III.

Marvin Berke and Megan England Demastus, Chattanooga, Tennessee for the Appellee, Cherie Lynn Dennis.

OPINION

Background

After four years of marriage, Wife sued Husband for divorce. The parties have one minor child. After a trial, the Trial Court entered a Final Judgment that, *inter alia*, declared the parties divorced, named Wife the primary residential parent of the parties' minor child, awarded Husband visitation, held that Husband would have no alimony obligation to Wife, divided the marital property, and provided that Wife's attorney would file an affidavit for attorney's fees.

Both parties filed motions to alter or amend. In his motion to alter or amend, Husband argued, in part, that Wife was not entitled to attorney's fees because she was not the prevailing party with regard to the residential parenting schedule. The Trial Court held a hearing and then entered an order that, *inter alia*, granted Wife a judgment against Husband for \$22,500 in attorney's fees, and granted Husband's motion, in part, with regard to the division of assets and liabilities.

Husband appeals to this Court only the award to Wife of attorney's fees.

Discussion

Although not stated exactly as such, Husband raises one issue on appeal: whether the Trial Court erred in awarding Wife attorney's fees.

As pertinent to this appeal, Tenn. Code Ann. § 36-5-103 provides:

(c) The plaintiff spouse may recover from the defendant spouse, and the spouse or other person to whom the custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

Tenn. Code Ann. § 36-5-103(c) (2005). Thus, pursuant to the statute, we review the issue raised on appeal for abuse of discretion. *Id.*

Our Supreme Court discussed the abuse of discretion standard in *Eldridge v. Eldridge*, stating:

Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to [the] propriety of the decision made." A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice

to the party complaining.” The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court.

Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001) (citations omitted).

Appellate courts ordinarily permit discretionary decisions to stand when reasonable judicial minds can differ concerning their soundness. *Overstreet v. Shoney’s, Inc.*, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999). A trial court’s discretionary decision must take into account applicable law and be consistent with the facts before the court. *Id.* When reviewing a discretionary decision by the trial court, the “appellate courts should begin with the presumption that the decision is correct and should review the evidence in the light most favorable to the decision.” *Id.*

As this Court explained in *Sherrod v. Wix*:

Trial courts have long had the authority to award legal expenses in custody or support proceedings. These awards are not primarily for the benefit of the custodial parent but rather to facilitate a child’s access to the courts. *Graham v. Graham*, 140 Tenn. 328, 334-35, 204 S.W. 987, 989 (1918).

* * *

As a result of [Tenn. Code Ann. § 36-5-103(c)], the Tennessee Supreme Court has noted that awards for legal expenses in custody or support proceedings are “familiar and almost commonplace.” *Deas v. Deas*, 774 S.W.2d 167, 170 (Tenn. 1989).

Sherrod v. Wix, 849 S.W.2d 780, 784-85 (Tenn. Ct. App. 1992).

The Trial Court designated Wife as the primary residential parent of the parties’ minor child, over Husband’s objections. Husband argues, in part, that Wife cannot be considered the prevailing party because Wife did not win on every disputed issue at trial with regard to custody and visitation. Specifically, Husband argues that Wife was not the prevailing party because Husband was awarded significantly more visitation than Wife proposed at trial that he be allowed. However, it is not necessary for a party to prevail on every single disputed issue in order to be awarded attorney’s fees pursuant to Tenn. Code Ann. § 36-5-103(c). Wife was the spouse named as the primary residential parent of the parties’ minor child, and we do not find the Trial Court abused its discretion in finding Wife to be the prevailing party. As such, the Trial Court had the discretion to award Wife attorney’s fees pursuant to Tenn. Code Ann. § 36-5-103(c).

Husband also argues that Wife should not be awarded attorney’s fees under Tenn. Code Ann. § 36-5-103(c) because she has a “superior ability to pay her own attorney’s fee...” by virtue of the distribution of the marital estate. Husband, however, is mistaken that Wife was required to show a need with regard to attorney’s fees awarded under Tenn. Code Ann. § 36-5-103(c). As this Court has stated:

[W]e find that ability to pay should not be the controlling consideration with regard to awards for legal expenses in custody or support proceedings. It is certainly a factor to be considered, but trial courts may award attorney's fees without proof that the requesting party is unable to pay them as long as the award is just and equitable under the facts of the case. The purpose of these awards is to protect the children's, not the custodial parent's, legal remedies.

Id. at 785.

At a minimum, we find that reasonable minds could disagree as to the propriety of the decision made by the Trial Court to award attorney's fees, the very essence of a discretionary decision. The Trial Court did not apply an incorrect legal standard or reach a decision against logic or reasoning. Given this, we will not substitute our judgment for that of the Trial Court. We affirm the Trial Court's May 6, 2008 order.

Conclusion

The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, George Emmett Dennis, III, and his surety.

D. MICHAEL SWINEY, JUDGE